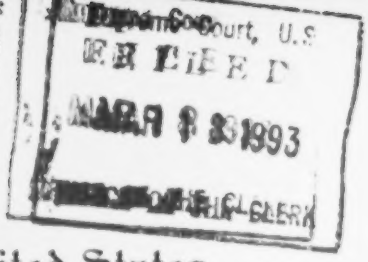

No. 92-996

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BURTON D. LINNE, JACK O. SLATER,
and JOHN C. IMLAY, IV,

Petitioners,

v.

JAMES T. RIDEOUTTE, JOHN M. CONROY,
THOMAS D. BLONDIN, ROBERT W. ROSEN,
and STANLEY F. KRYSA,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioners Burton D. Linne *et alia* ("Linne") hereby reply to the Brief for the Respondents in Opposition.

ARGUMENT

Respondents raise two arguments, both of which highlight the need for this Court to issue a writ of certiorari here.

I. Respondents first wrongly contend that Linne's

> submission in this Court appears to acknowledge that respondents are immune from claims premised on the respondents' in-court actions, see Pet. 13-14, and there accordingly is no warrant for review of the court of appeals' decision on that question.[1]

Yet, inconsistently, respondents correctly state that Linne

> sought a declaratory judgment that certain statements, testimony and other representations [of respondents] were false and fraudulent and an injunction restraining the respondents from making related statements in connection with any prospective criminal, civil, or administrative proceedings.[2]

So, there *is* a "warrant for review of the court of appeals' decision on that question", because none of respondents has *any* immunity (absolute or qualified) against declaratory or injunctive relief.[3]

II. Respondents then contend that Linne's

> allegations that [respondents] "obstruct[ed] justice" and engaged in a "*post*-criminal-trial cover up" are premised on [Linne's] continuing assertions that the government has suppressed evidence demonstrating petitioners' innocence. * * * That matter, however, was fully litigated and definitively resolved in the prior criminal proceedings.
>
> The Fourth Circuit held that the Rideoutte report was not material exculpatory evidence, * * * and it follows that

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[1] Brief for the Respondents in Opposition at 5.

[2] *Id.* at 3.

[3] *See* Pulliam v. Allen, 466 U.S. 522 (1984).

> [respondents'] failure to produce that report cannot support [Linne's] claim in this *Bivens* action that [respondents] acted wrongfully.[4]

These contentions are triply wrong.

A. Even respondents do not claim that the Fourth Circuit either found Rideoutte's testimony to be true, or held that the Rideoutte Report did not categorically refute respondents' pretense that Linne had "establish[ed]","formed, directed, and operated * * * the Bullion Fund".[5] Thus, the Fourth Circuit's decision is, by respondents' own tacit concession, irrelevant to Linne's claims for declaratory and injunctive relief.

B. Linne's other claims were ***not*** "fully litigated" in the Fourth Circuit appeal of the criminal convictions.

First, the Fourth Circuit did not even consider, let alone decide, whether respondents' wrongdoing denied Linne his ***absolute*** rights of procedural due process[6] at any stage of the criminal proceedings. *Second,* the Fourth Circuit explicitly refused to entertain as an issue whether the indictment in particular was the product of respondents' fraud.[7] Yet, there can be no question that the Rideoutte Report was withheld from the Grand Jury; that the Grand Jury was deceived into believing that Linne had "establish[ed]","formed, directed, and operated * * * the Bullion Fund";[8] that this deception "enabled us [*i.e.,* respondents] to bring [the] indictment at all";[9] and that, without the indictment, there could have been no criminal trial, no convictions, and no

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[4] Brief for the Respondents in Opposition at 5.

[5] Petition for Certiorari at 3.

[6] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978).

[7] Petition for Certiorari at 7 & n.17.

[8] *Id.* at 3.

[9] *Id.* at 10 & n.29.

appeal to the Fourth Circuit.

C. And Linne's claims were not "definitively resolved" in the Fourth Circuit appeal, either.

First, that (as respondents say) "[t]he Fourth Circuit held that the Rideoutte report was not *material* exculpatory evidence" within the *Brady* rule[10] is irrelevant. For a victim of a prosecutorial conspiracy can suffer loss of his *absolute* rights of procedural due process even if the charges against him are ultimately sustained.[11] Here, the evidence in the Rideoutte Report was plainly exculpatory, even if not "materially" so; for it proved beyond doubt that Linne had ***not*** "establish[ed]","formed, directed, and operated * * * the Bullion Fund", as the deluded Grand Jury falsely alleged in the indictment. Even if respondents had no duty to disclose the Rideoutte Report to Linne under *Brady* or the Jencks Act[12], they had a clear-cut duty *not to lie to the Grand Jury, to Linne's counsel in the criminal trial, to the District Court in the criminal trial, and to the Petit Jury about the matters the report covered.* It passes understanding how the attorneys from the Department of Justice representing respondents could, with straight faces, deny that their clients' web of lies regarding the information in the report did not constitute obstruction of justice, mail fraud, conspiracy to suborn and to commit perjury, perjury, criminal violation of civil rights, *et cetera ad nauseum* simply because respondents may have had no duty to disclose the actual report.

This is particularly true with respect to Rideoutte himself. Being its author, Rideoutte knew what the report contained and that the prosecutors were in possession of it. Aware of the false allegations in the indictment, Rideoutte knew that the prosecutors had suppressed the contents of the report from the Grand Jury. Prepared to commit perjury, Rideoutte knew that the prosecutors had withheld the report from Linne's criminal-defense

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[10] *See* Brady v. Maryland, 373 U.S. 83 (1963).

[11] *See* Carey v. Piphus, 435 U.S. 247 (1978).

[12] 18 U.S.C. § 3500.

attorney, in order to conceal that perjury and make it effective. And, after Linne's discovery of the report, Rideoutte knew that the prosecutors were engaged in a "cover up" to deceive their superiors as to what had transpired. Do counsel for respondents actually expect this Court to accept the notion that Rideoutte had *carte blanche* to participate in or to refuse to expose this conspiracy — much of which involved activities of his *un*related to his appearance as a witness in the criminal trial — simply because the prosecutors were not required, perforce of *Brady* or the Jencks Act, to disgorge the Rideoutte Report?!

No, respondents' argument is arrant nonsense: Even if they had had no obligation under *Brady* or the Jencks Act to disclose the Rideoutte Report, they had a *separate and independent, absolute* duty under the Due Process Clause of the Fifth Amendment not to lie, and lie, and lie about the information contained in the report. That that information was supposedly not "*material* exculpatory evidence" at most goes to the *amount* of damages Linne may recover for respondents' violation of his absolute procedural-due-process rights; it does not relate to their *liability* for violating those rights.

Second, the Fourth Circuit did not "resolve[ ]" in any way, let alone "definitively", whether the Rideoutte Report was in any operative sense not "material" to respondents' obstruction of justice in the Grand Jury. Neither did the Fourth Circuit "resolve[ ]" whether respondents' obstruction of justice in the Grand Jury denied Linne his procedural-due-process rights. And surely respondents cannot argue that this Court should disregard their wrongdoing as "harmless" because of Linne's subsequent conviction. For, just as it would hardly be "harmless" under the Fifth Amendment for prosecutors to obtain a conviction based on an indictment they themselves forged without the participation of a Grand Jury, so too is it the opposite of "harmless" under that Amendment for respondents to have obtained a conviction based on an indictment that would never had been handed down had they not deceived the Grand Jurors as to Linne's controlling role in the Bullion Fund. If, as the Krysa letter admits,[13] the indict-

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[13] Petition for Certiorari at 10.

ment would never have been handed down at all, absent respondents' wrongdoing, Linne's subsequent conviction and its affirmance by the Fourth Circuit are irrelevant to respondents' civil liability for that wrongdoing.

CONCLUSION

This case is a perfect complement to *Buckley* v. *Fitzsimmons* and *Albright* v. *Oliver*.[14] For that reason, this Court should either grant Linne's petition or hold that petition pending its decision in *Buckley*. If the Court chooses to hold the petition, it should allow the parties to file supplementary briefs on the effect

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[14] No. 91-7849 (argued 22 February 1993) and No. 92-833 (certiorari granted 1 March 1993), respectively. In particular, the first question presented in *Buckley* challenges absolute prosecutorial immunity for acts in a *pre*-indictment investigation. Here, Linne challenges absolute prosecutorial immunity for acts in a *post*-criminal-trial "cover up". The second question presented in *Buckley* challenges absolute prosecutorial immunity for false out-of-court statements. Here, Linne challenges the existence of any immunity for respondents, where he seeks a declaration that their previous statements in court about his connexion to the Bullion Fund were knowingly false and an injunction against their repetition of those lies in future official proceedings. And the third question presented in *Buckley* challenges absolute immunity for a witness who conspired with prosecutors to manufacture false inculpatory evidence outside of court. Here, Linne challenges absolute immunity for a witness (Rideoutte) who conspired with the other respondents to secrete exculpatory evidence.

of *Buckley*.

Respectfully submitted,

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